IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

The Estate of JESSE D. WILLIAMS, Deceased, by and through MAYOLA WILLIAMS, Personal Representative,	)	Volume 3-B
Plaintiff,	)	
vs.	)	No. 9705-03957
PHILIP MORRIS INCORPORATED,	)	Afternoon Session
Defendant.	)	3:00 - 5:00 p.m.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled Court and cause came on regularly for hearing before the Honorable Anna J. Brown on Wednesday, the 24th day of February, 1999, at the Multnomah County Courthouse, Portland, Oregon.

APPEARANCES

Raymond Thomas, James Coon, William Gaylord and Charles Tauman, Attorneys at Law, Appearing on behalf of the Plaintiff; James Dumas, Billy Randles, Walt Cofer and Pat Sirridge, Attorneys at Law, Appearing on behalf of the Defendant.

KATIE BRADFORD, CSR 90-0148
Official Court Reporter
226 Multnomah County Courthouse
Portland, Oregon 97204
(503) 248-3549

(Wednesday, February 24, 1999, 3:00 p.m.)

P R O C E E D I N G S

(Court Reporter Jennifer Wiles reported Morning Session and Afternoon Session until 3:00 p.m.)

(Whereupon, the following proceedings were held in open court:)

THE COURT: All right. Is everyone ready to get started? I appreciate the courtesy of the spectators. You know how distracting it is when people get up and move in the middle of your remarks. You have been wonderful. I thank you for that, and we're ready to bring the jury in, I believe. Let's do that.

(Whereupon, the following proceedings were held in open court, the jury being present:)

THE COURT: All right. I'm taking it on faith that you're all behind that screen, jurors.

So Mr. Thomas, you may continue with plaintiff's opening.

http://legacy.library.ucsf.edu/tid/km05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

OPENING STATEMENT (Continuing)

BY MR. THOMAS:

Thank you, Judge. The air is moving.

This is my portion of the opening statement, and I am going to try to be done by 3:45, so I am going to move fast.

We talked about this case being about choices and about responsibilities. Let me say at the outset, Jesse Williams has made choices and his family accepts responsibility for those choices, and asks you to consider and compare the choices that Jesse Williams made with the choices that Philip Morris made.

And you know that the development of knowledge about tobacco was being played out in a big way. And the role that tobacco plays and has played in our lives before cigarettes came into existence goes way back.

I am going to show you a smaller time line, it's blank, and this is the time line of Jesse Williams' life. I want to introduce to you the testimony that we anticipate producing in relation to him, so you can know a little bit about who he is.

Well, first of all, Jesse Williams was born in 1929 in Crockett, Texas. He had six brothers and sisters and he was born on a farm; and he grew up in Crockett, went to high school there, graduated. As soon as he got out, he joined the service.

This is a picture and it's -- I've got a collection of pictures that I'm going to show you. I am sorry that they're not higher quality, but most of the pictures are ones that are portraits. There are a not a whole lot of pictures, but the few that there are, we'll show you his history.

This is Jesse Williams right here. You can see that he and his brother are both in uniform. This is before he went to the Korean War. So Jesse Williams left Crockett, Texas. He was in the service. He went to Fort Knox, and then he went to Fort Lewis.

And this is a little better quality picture of him. When he left home, there he is on a bicycle. Now, we know that cigarettes began being part of our popular culture in about the 1920s, 1930s. Jesse Williams, being born in 1929, was raised when things were different in

regard to the way that cigarette companies talked about cigarettes, and the way that cigarettes were viewed.

And we'll see evidence about the fact that Philip Morris and other cigarette manufacturers actually claimed that cigarettes had health benefits. In those days, famous

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

baseball players, movie stars, famous people who were glamorous, talked about how cigarettes were a wonderful thing.

And in the magazines and the popular press, cigarettes were not associated with any kinds of health concerns. This was the background from which Jesse Williams came. These were the things that influenced him before he made a decision to even try smoking or not smoking a cigarette.

This is another picture of Jesse Williams. This is the way he looked when he met Mayola Williams, and they met each other when he was in Portland on leave from Fort Lewis, and he was visiting a friend of hers.

And the thing that she remembers about him was that she just loved his smile and his teeth. He had beautiful white teeth. And it

was for her love at first sight, and their romance led to being married in 1952. They were married at the time that he died for 45 years, and they had six kids.

Now, I just want to tell you a little bit about who Jesse Williams and Mayola Williams were in terms of their work. Jesse Williams had his career as a janitor. He worked in a number of schools in the Portland School District, including Portsmouth, Martin Luther King. He retired from the Portland School District in 1982 -- I'm sorry, 1992.

And Mayola Williams had a number of jobs, but probably the one she has longest was down here at the Portland Fish Company where she was a clerk in the office for ten years, and then she also worked for Portland Public Schools in a clerical position for two years before she retired in 1982.

And to just give you an idea about this family, here they are. I guess you know who Jesse is, and you know who Mayola is, and there are their six kids. This was taken in the early '60s.

Now, when Jesse Williams was in the

service, he went to Korea. He was not yet a cigarette smoker, but when he got there, he was a sentry, and his sergeant told him that, "If these Korean mosquitoes are giving you a hard time, if you smoke cigarettes, it will keep them away."

And that's what he did. Now, he started smoking over there before Marlboro, the cigarette, was developed. That was in '54-'55. This was earlier in the '50s, during Korea. We know that when he came back and met Mayola Williams by then he was a cigarette smoker.

And then when Marlboro came out, Jesse Williams become a Marlboro smoker. Jesse Williams was a loyal smoker. He was a good customer. He paid the price for the cigarettes.

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

He smoked cigarettes that were Marlboros his whole life until he died in 1997, so he made paid the price for the cigarettes and he also paid the price for smoking them. He paid with his life. So as a customer, he did what Philip Morris wanted him to do. The evidence will show that he fulfilled his end of the bargain.

And there is a history that Jesse Williams had over the course of the years of his

life in regard to smoking, he wasn't what we've heard some people describe, sort of a casual smoker. Jesse Williams smoked a lot.

When he began smoking in the early 1950s, he was about a pack-a-day smoker, but he swiftly rose in the number of cigarettes that he smoked a day to being a two-pack-a-day smoker, and when he got into the '70s and '60s, he began smoking two packs and into the '70s and into the '80s, three packs of cigarettes a day. So he was what would be considered a heavy smoker.

And there were some things about Jesse Williams and smoking that you're going to learn about in this case. I can't talk like Jesse, but I've heard -- and I got to meet him before he died. I've heard from his wife, Mayola, that what he would say when he wanted to smoke a cigarette was, "I got to take a smoke."

And then we know in 1964 when the Surgeon General's Report came out, when one of his family members would say something about, "Well, now, those cigarettes are harmful to you. You know about that." What Jesse would say was, "You know, that's what the Government says, but the tobacco company knows what they put in them,

and they wouldn't sell them if they was as bad as anyone says."

And there are some examples that you are going to learn about in terms of the relationship that Jesse Williams had with cigarettes. First, I'd like to show you where he lived, because, you know, there is talk in this case about all of the controversy, allegations, denials, but if we were to go up to the top of one of the downtown tall buildings here, and go up on the roof, all of us, and take a look around the town, we could pretty much see Jesse Williams' life and where his life was during the time that he was alive after he came back from Korea.

He lived primarily in Southeast and Northeast Portland. The last place he lived, and maybe I'll blow this up a little bit, was over at 35th and Ainsworth. I went over and took this picture just the other day. This is the house that Jesse died in right here.

It's at 35th and Ainsworth, maybe you can see down there, you know how Ainsworth is a boulevard. I just caught a little bit of it down there. This is the house where Jesse died.

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://industrydocuments.ucsf.edu/docs/kmhd0001

He loved to garden. Since he died, the house has gone downhill a little bit in the yard, but he loved to garden and be outside.

Towards the end of his life, he didn't smoke inside anymore, he smoked outside, so he would go out here in the garage. And when it was raining, he would open up the garage door and sit inside the garage and smoke. In order to smoke that much, a person has to smoke every 20 or 30 minutes. So he spent a lot of time smoking cigarettes and the view that he had towards them was mixed.

But we do know that when we get an ice storm, Jesse Williams' view of his role in the family was as the provider. When we would get an ice storm and the town would shut down, they'd be out of milk in the house, the conversation, "Well should we go out or not." Well, if it wasn't an emergency, Jesse would say, "Well, let's see what we can do today. Let's see if we can get by with orange juice."

But at the end of the day, even if the ice storm turned worse, and he ran out of cigarettes, it became more important to get cigarettes than milk, and he'd go out and he'd

get those things, so that he wouldn't run out of cigarettes.

In fact, evidence in the case is going to be that he and Mayola Williams had a little game. She was not a smoker, never has been. She doesn't like smoke, didn't like him smoking. They would buy cigarettes by the carton. The cigarettes that he would smoke are Marlboro 100s. So you may know what those are, they are long cigarettes.

She'd take one out of the carton, put it up in the cupboard, and then when Jesse Williams would run out of cigarettes, he would go, "Oh, honey, I am out of smokes. I am out, got to take a smoke."

She'd say, "Oh, Jesse, up there behind the cereal, you got one more pack, you better make it last," and then he would make it last until he went over to the school and was able to buy more the next day.

Now, he was a guy who tried to quit smoking. In about the middle of the 1970s, he began to try to quit. He had good intentions, but he couldn't do it. And what he'd say when he'd light a cigarette after he tried to quit, I

think the longest he ever went was maybe three days, he'd say, "Honey," that's what he called Mayola Williams, "Honey, I just can't, I just can't."

Now, it's not the plaintiff's position in this case that Jesse Williams was completely physically unable to quit smoking cigarettes,

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://industrydocuments.ucsf.edu/docs/kmhd0001

and whether he was habituated or whether he was addicted is something that you are going to have to decide yourself in this case based upon the things that you learn.

But I believe that the evidence will be in this case if you were to take people on a spectrum, occasional smokers. People where they wake up in the morning, "I could have a cigarette or I could have take a shower. I could have a cigarette or eat breakfast, or I could have a cigarette or I could walk the dog," and they chose to do those things rather than instead of having a cigarette in the morning when the blood level of nicotine is down, and if they were on one end of the spectrum as a smoker, then Jesse Williams was on the other end.

Because the evidence is going to be that

when Jesse Williams woke up in the morning, there was one thing that was going to happen first, and that's a cigarette. In fact, Jesse Williams had chronic bronchitis through his adult life.

And the evidence will be some time in the middle of the night, he would wake himself up coughing. And he'd be like, Mayola wakes up, she would be lying there. He would say, "Honey, I got to take a smoke." In the middle of the night, he'd smoke a cigarette before he could go back to sleep.

Now one of the favorite things that Jesse Williams had in his life was to watch basketball games on TV. One of the favorite things that he had was to have his kids over, and when the game was on, All Star game, championship game, didn't matter, in the course of that game, every 20 minutes or so, whether it is a big play or Michael Jordan is in, whether the Blazers are up, "Hey, I got to go take a smoke outside."

Know TV in the garage, "Got to go take a smoke." Leaves the kids inside; outside for a cigarette. And then he he'd come back in, "Oh, what did I miss?" 20 minutes later, no matter

who's in, no matter what the score is, "I got to take a smoke," and that was the course of this man's life.

I want to talk to you a little bit about the legal claims in this case, I know the defense is going to talk a little bit about that, and I just want to clarify a couple things.

First of all, there is not a claim in this case by the plaintiff, and we know the warnings changed, right, over the years, there is not a claim in this case that these legal warnings were inadequate; and, therefore, we have a right to have a lawsuit against Philip Morris in this case. There is no claim about that. That's their defense.

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

Our claim is that what they did and what they actually but into these cigarettes, and what they said, that's the basis of the claim: What they told the American public, what they did to the American public, Jesse Williams being a part of it, that's what creates the claim in this case.

Now there are some words for it, and we're going to hear more about this at the end,

but in a couple of words, product liability defect, because what Philip Morris put into the cigarettes was different from what people expected.

People thought cigarettes have tobacco. What Philip Morris did was to create nicotine delivery systems that use chemical enhancement to make it so the kick from cigarettes was harder and that in the course of doing that, they created a higher market share for themselves to the point now where cigarettes sold by Philip Morris are almost half of the United States market, and Marlboros are over one-third of the cigarettes sold in the United States. And these things were beyond consumer expectations about what a cigarette is all about.

Second, what Philip Morris did was negligent. It was negligent; that they did not behave as a reasonable manufacturer would. Now, in regard to this, you can take into account what Jesse knew, what Jesse was told, and you can also take into account what Jesse -- who Jesse was, and you can also take into account who Philip Morris is, and who had the broadest

space of information.

There is going to be a war in this case in this courtroom about what did Jesse know. And you're going to have to go through it. Philip Morris has gone back to the school books that he had about the dangers of tobacco or the bad things of tobacco from back in the 40s.

And on the hand, the plaintiff was going to be presenting evidence from back then about how the weight of what people saw and the images of what people saw about cigarettes and tobacco created an altogether different image. It was glamorous.

The Marlboro man with the tattoo appealed to a guy coming back from the service who had just fought for his country. The Marlboro man was a person who had life that was full of adventure, and that that Marlboro man image appealed to Jesse Williams and he stuck with it over the course of his life.

The actual medical causation in the case in the claim by the plaintiff is that the cigarettes that Jesse Williams smoked, from 1988 to when he died in 1997, were a substantial factor in causing his cancer. Now, this is an

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://industrydocuments.ucsf.edu/docs/kmhd0001

important point, not the only cause, but a substantial factor.

In other words, substantial means not insignificant. At the end of the case, the judge will give you a jury instruction called causation, and if you have questions about what does causation mean, how certain do we have to be that those cigarettes after 1988 caused Jesse Williams' cancer, that's the standard against which you will apply the evidence that you've learned and what you will hear from his treating doctors.

Now, I'm not talking about some doctors brought in by either side after this became a lawsuit. I mean the people who treated Jesse Williams because he was their patient. The testimony from these local physicians will be that those cigarettes were a substantial factor in causing his death. And in fact, Dr. Segal, who is his treating physician, testified and will testify and wrote in this letter, "Mr. Williams' lung cancer" -- can you see it? "was almost certainly caused by cigarette smoking. He smoked two packs a day for 45 years when his lung cancer was diagnosed, and he

continued to smoke until his death."

Did you hear that? You didn't know that yet, did you? He continued to smoke after he was diagnosed. He tried to quit and could not quit, and I'm going to tell you the story about how Jesse Williams lived his final five months because that's how long he lasted after his diagnosis.

First of all, though, let's get a little time context. This is Jesse Williams at work shortly before he retired, Martin Luther King, you guys recognize that kind of stairway, those of you that went to Portland public schools? This is the school, isn't it? That's him. That's him before he retired in '92.

Now, he has pretty good health. He had a ruptured appendix and that was bad. He had peritonitis, and that was pretty bad. He even had reported that he had some exposure to asbestos, although there is no evidence that any of these three things had anything whatsoever to do with his death.

He retired in 1992. It's not like he quit working. He had a little business, a little janitorial business that he did on the

side. He had done it for years. It didn't have a name, I don't think. It was basically Jesse Williams working for some long-time customers.

And in 1996, basically what he was doing was he was doing his gardening and taking care of a couple of his accounts still cleaning. The role that he had in his family was as provider

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

and father. His health had deteriorated. He has been getting bronchitis more and more frequently.

And in fact, in 1996, he got a bronchitis that just didn't seem to go away. He lost 27 pounds in six months. Mayola Williams noticed it and made him go in. Let me tell you something, Jesse Williams was not a guy that liked to go to the doctors.

He had a little bit of bloody phlegm that he was coughing up, and he was wheezing at night, so he went in in October of '96. And he had tests done and it was determined that he had lung cancer, and Judge Brown has told you about that. Adenosquamous is lung cancer. In fact, it was advanced.

It was inoperable. He went through chemotherapy. He went through radiation. He

had good doctors. They did everything they could, but they couldn't save him.

This is his death certificate, anybody ever seen a death certificate? It is an official form. I just wanted to show you. I may not be able to do a very good job of it, but it is written by Dr. Wright. I am going to try to read it to you.

It lists three things that led to his death: Cardiopulmonary arrest. You can't see this very well. It lasted ten minutes. Hemoptysis -- did I say that right, Bill? That means that he was bleeding through his airway and out his mouth and nose, that lasted 20 minutes. And Stage Three B, non-small cell lung cancer that he had for five months.

Now, how that translates -- boy, I am going to have to fly -- you know what his medical treatment was. In March 1997, he went to work. It was a weird day, though. He took Freida (ph) and Joanne, two kids. He didn't like anybody to help him work. He didn't like any help, he wanted to do it himself.

What they did was they went over -- this is over near Lincoln High School. See the West

Hills here? I took this picture. This is one of his buildings. He did this building. The day that he died, Freida and Joanne went and helped him. He didn't want their help, but they made him. He was getting real weak.

And that day he kept saying, "Oh, you girls are working to hard, sit down," and they wanted to talk to him. He came home that night, has their supper, he was feeling real weak, went to bed like usual, and Mayola Williams will tell you, it was weird. Jesse was not a guy -- he was not a man of a lot of words. That night he was so affectionate, she didn't understand it.

She thought, maybe he is making a turn for the better here. At 2 o'clock in the morning, he woke up, couldn't catch a breath.

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

He had a wastebasket by the bed, so he could spit in it because he had a lot of stuff coming up because of his cancer. She said, "Honey, are you okay?" He said, "Oh, I'm fine, I'm fine."

So she gets up, she comes around and turns on the light, looks over, and he is actually like -- and I'm sorry to do this to you, but he's vomiting -- it looks like he's vomiting blood.

It is hemoptysis. What's happened is, is that his lung cancer has gotten to the point where it has so weakened the structure of his chest, one of his arteries has burst and the blood is now coming out through his airway. He is breathing blood. I mean, streaming blood. She gets on the phone, 911, "Honey, you stay there, you stay there."

He says, "I got to get up. I got to go to the bathroom, Honey," and he's just got blood of all over him and doesn't realize what's going on. She is on 911, and he just won't listen to her. He gets up and goes into the bathroom. He's just got blood coming down his face.

And he goes in and he sits on the toilet. She says to 911, "He went to the bathroom. What am I supposed to do?" They said, "Stay on the phone, we have ambulance coming." She goes in to check on him, and what she finds is him on the toilet, sitting on the toilet, kind of slumped down like this. And the blood is no longer pouring out of him, but it is just a big long drool of thick blood, and he is dead.

Joanne Williams was living with him, the daughter, came in, checked his pulse, he didn't

have a pulse. He died. He was dead. He smoked and he worked on the day that he died. And this is the last picture we have of him. He wasn't a hat wearer now, but he didn't have any hair from the chemo, so there is he is. That's the last picture of him.

Okay. Well, you heard what you said before his diagnosis. You know what he said after his diagnosis? The evidence is going to be, "Honey, those suckers are killing people. I believe it now and now look at me."

So what he did was he asked Mayola Williams and his daughter, Joanne, to help him to make them pay, Philip Morris, for what they have done because he felt betrayed. He had believed them. They're the ones who know what they put in the cigarettes, and this lawsuit is the result of that.

Now, you are going to be paying good attention listening to the evidence. It's not going to be easy, but it is not anything compared to what you have to do at the end, because at the end of the case, you are going to have to decide, well, what responsibility did Jesse Williams have for this, based upon what he

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

knew, and what responsibility did Philip Morris have for this based upon what they knew and what they said and what they did.

Now, I don't have much time, so I am going to give you a couple of legal concepts that I would at least like for you to have in the back of your minds. In regard to the product liability and the negligence claims, we said that we accept responsibility for what Jesse Williams did.

Does Philip Morris accept responsibility for that what they did? We're going to find out in a few minutes when Mr. Cofer talks to you, but it is anticipated from the denial of the allegations in the complaint that they're going to take an approach that goes like this.

One, it's not proven that cigarettes cause cancer. Two, cigarettes didn't cause this cancer. And three, even if cigarettes do cause cancer, Jesse Williams knew what he was doing. Now, you're going to have to think your way through that and make up your mind about who shares responsibility based upon what you've seen and what you will see about how this company has behaved from the beginning when it

found out that this product may be a problem.

And if, at the end of the case you decide, and this is separate from the causation, but if you decide that Jesse Williams was more at fault, it is just like in a car accident, if Jesse Williams had greater responsibility, more than 50 percent for what happened relative to Philip Morris, if he was more at fault than them in what happened, he loses.

However, if he was less at fault than they were, he loses the percentage of his own fault, but so long as they're more responsible than him, if they're greater than 50 percent, what happens is that he pays the price for his responsibility because his damages are reduced, not by you, but by the judge.

Now, damages: There are three kinds of damages, but there is basically two kinds for purposes of the production here, and you are not going to have to decode under the first type which are compensatory damages who is supposed to get what. That's not something that you're involved with. It is to the estate, the damages that you provide.

The parties have agreed, under

compensatory damages, that what Jesse Williams' medical bills were, these are economic damages, were $20,801. And they're not agreeing -- Philip Morris is not agreeing to be responsible for it, but we're agreeing that that is what his medical bills were, and that his funeral was $684. Those are his economic damages. That's

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://industrydocuments.ucsf.edu/docs/kmhd0001

pretty easy.

Noneconomic damages, however, in this case, are a little more difficult. Those of you who have jury experience know it includes some concepts, and you're going to learn about them at the end and I'm just going to highlight them for you, the loss, care, support and love that this family, Mayola Williams and his six children have from the loss of their father and husband at age 67, when he has an approximate life expectancy of 80 years.

The loss to his estate by him dying early in terms of any financial income he would have had, and the pain and suffering that Jesse Williams had from when he got diagnosed in October of '96, to when he died in March of 1997, and a ceiling above which you cannot go for this is one million dollars.

So that's the first type of damages. And that's to be calculated by the jury if it gets beyond the liability considerations that I told you about before.

Now, there is another type of damages that you get to in this case if you decide that Jesse Williams was not more greatly at fault than Philip Morris, and this is a separate, completely different calculation that exists without regard to where these damages go, what happens to these damages, and they're called punitive damages.

The consideration is how much money would it take to make it so that Philip Morris, if they behaved in a willful and wanton manner, without disregard for the health and the safety for their customers, including Jesse Williams, how much would it take to punish them and to deter them.

And as a part of that, and not to make Philip Morris into some kind of target, but for you to understand what their financial situation is, if we get to this point in the case, we'll be presenting evidence to you that briefly is Philip Morris is one of the biggest, most

profitable companies in the world.

Cigarettes are two-thirds of their income, but they have diversified based upon the cigarette money that they made in this century, to the point where they're now part of a holding company that has other non-tobacco-related companies, but while those companies account for 50 percent of their gross receipts, those other companies only account for a third of the profits.

Did I say that wrong? No, I didn't. I think I got it right. I am getting confused now. Let me look at my notes. Sorry. That's right. Cigarettes are two-thirds of the income of the holding company that owns Philip Morris. It is an extremely profitable business.

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

So I am out of time. Did I forget anything? I am out of time. We're at the present. I am not going to get to talk to you until the end of the case. We appreciate your attention. This is not going to be an easy time.

But believe me, it's going to be interesting, it's going to be challenging, and remember this, those of you who have had jury

experience know it, the real work in this case, it's going to begin when all this stuff, all these exhibits go to you and you have the job to make justice, and we'll accept your verdict. Thank you.

THE COURT: Thank you, Mr. Thomas.

Jurors, while the plaintiffs disassemble their exhibits, and the defense sets up, if you want to stand and stretch, do that. We'll stay here in court. Feel free to stretch your legs a little bit while we get organized.

(Pause in proceedings.)

THE COURT: We'll need to have everyone take a seat. If you're in the courtroom, you'll need to be seated, sir. There are seats. Have a seat, please.

All right, Mr. Cofer.

MR. COFER: Thank you, Your Honor.

OPENING STATEMENT

BY MR. COFER:

May it please the Court, counsel, Mrs. Williams, members of the jury: We talked yesterday, but just to remind you, I'm Walt Cofer. I represent Philip Morris. We talked yesterday about there being two sides to every story.

I don't know whether any of you remember Paul Harvey, he is a popular radio commentator, and he would always tell the rest of the story. Well, you've heard in some detail from both Mr. Gaylord and Mr. Thomas the evidence that plaintiff will present, and they've told you really their themes and what they believe this case is about.

Now it's my turn on behalf of Philip Morris to tell you the evidence that we will present to tell you what we think this case is about, to tell you, in essence, the other side of the story.

And Mr. Thomas did anticipate a number of the things I'm going to say, so I am going to tell you this, I am going to talk about Philip

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

Morris and its responsibility, its obligation to manufacture a safe product, the safest product they can, and what its done to meet that obligation.

I'll tell you what I am going to talk about first, and that isn't going to surprise you, I am sure, I am going to tell you what I think this case is about. Members of the jury, this case is about Jesse Williams and whether his family is entitled to recover money damages because Mr. Williams chose to smoke Marlboro cigarettes.

Now, in a nutshell, there will be two issues at the end of the case which you will be asked to decide. The first is, who is responsible for Mr. Williams' decision to begin and continue smoking?

And second, have plaintiffs proven that cigarettes purchased after September 1, 1988, caused Mr. Williams' cancer, not can cigarettes cause cancer, not do cancer cause most lung cancer, but has plaintiff carried her burden of proving to you that cigarettes purchased after September 1, 1988, caused Mr. Williams' cancer.

Now, that date's important because

Judge Brown will instruct you that in Oregon claims for the sale of products can only go back so far in time. That's Oregon law. That is not a special rule for tobacco. That applies to the sale of products across the board, so plaintiffs must prove that it's cigarettes sold after September 1, '88, that caused Mr. Williams' cancer.

Now, the evidence will be that from the time Jesse Williams picked up his first Marlboro cigarette, he was already on notice that cigarette smoking was linked to lung cancer. Over the years, he was repeatedly told by his family, his friends, his doctors, the newspapers and magazines that he read, and the Government, that he should stop smoking because smoking was harming his health and could cause lung cancer.

And plaintiff won't deny that he had that information. Plaintiff will concede he had that information. And the witnesses will describe Jesse Williams as a bright, independent, well read, smart man. But in essence, what they will tell you is that none of that information mattered because they'll say he was addicted to nicotine.

Members of the jury, before you jump to that conclusion, let's consider the facts. The evidence will be that according to the Center for Disease Control, 50 million persons have stopped smoking for good. 90 percent of those have stopped with no outside help; and, in fact, eleven members of Mr. Williams' own family have

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

quit at one time or another.

Now, plaintiffs will have you believe that Mr. Williams was different, but as you listen to their case, you ask yourself, where is that evidence? Where is the evidence that Mr. Williams was any different than those 50 million Americans who quit. Where is the evidence that Mr. Williams was any different than the eleven members of his own family that quit?

In Mr. Gaylord's remarks, he said something about cigarettes not being effectively regulated, so let's just switch to a new topic, let's shift gears, let's talk about cigarettes. Cigarettes are probably the most heavily regulated consumer product in history. Advertising is regulated by the Federal Trade Commission, and has been since the 1930s.

In 1955, the FTC told Philip Morris and the other companies, "You cannot disclose tar and nicotine levels in your ads. You can't tell the public that." In 1966, the FTC changed its mind and said, "Okay. You can provide that information, but you don't have to."

In 1970, the Federal Trade Commission changed its mind yet again and said, "You must disclose tar and nicotine levels, and what's more, we're going to tell you how to measure the amounts and we're going to tell you how to report it."

Now, let me pick up on something Mr. Gaylord said. He said there came a time when cigarettes were -- I don't know his exact words, but a product that was controlled, the nicotine was controlled.

Well, you bet, there did come a time when manufacturing processes became available, that you could consistently make a cigarette that had the same amount of nicotine in it and the same amount of tar in it, and those products were marketed and those levels were disclosed to the consumers, so people could make a judgment of what type of cigarette they wanted to smoke, so,

yes, it was controlled.

Philip Morris works hard to make sure they have a consistent product and those levels are disclosed so consumers can make informed decisions. One more thing about the FTC has told my client what sort of claims it can make, and what sort of claims it can't.

I think it was Mr. Gaylord or maybe it was Mr. Thomas, the suggestion that earlier in the century some companies made health claims. Well, some companies did get aggressive with there ads. The evidence will be this had nothing to do with Jesse Williams, but it is true that happened, and the FTC came down on them big time, and said basically, "You can't make health claims."

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

Why is this significant? Mr. Gaylord showed you a bunch of documents, but one document in particular he showed you said, "The Saratoga cigarette, a better cigarette physiologically." It has a lousy taste, so it wouldn't sell, and we couldn't tell the physiological side of the story.

Two points, Philip Morris couldn't tell the physiological side of the story. The FTC

wouldn't let them. And the second point, the cigarette tasted bad. Do you think cigarette smokers are going to smoke a cigarette that tastes bad? And I don't really think Philip Morris can be blamed for not telling the physiological story when the FTC wouldn't let them. So that's just advertising.

Now, Mr. Gaylord talked about cigarettes aren't a natural product. Let me tell you something, the small amount of flavors that are added to tobacco, the small amount of ingredients that are added to tobacco as flavors are reviewed by the Food & Drug Administration, and the Department of Health and Human Services.

Neither Government agencies has ever told any of the companies that any of those should be removed, including the ammonia compounds that Mr. Gaylord talked about.

Warnings. Warnings are required on every page of cigarettes sold in this country and every single ad. Congress tells the companies, including Philip Morris, exactly what those warnings are to say, how big they are to be, where they're to be placed, and when they're to be changed.

Since 1966 -- can you see this? I'll show you, but the point is you'll get the drift, by 1966, one of these warnings has been required on every package of cigarettes sold in this country by law. It has changed over time and I'll talk about that, but the point is from 1966, every cigarette that Mr. Williams smoked came from a package with the warning on the side.

Now, Mr. Thomas told you about Mr. Williams' smoking habits. Let's say he smoked only two packs a day from 1966, that's 40 cigarettes a day. If you assume he looked at that package only twice a day, that's 14 a week, 730 a year.

And over the 31 years that he smoked cigarettes with the warning on the side, he would have seen over 22,000 warnings that cigarette smoking could be harmful to health or could cause lung cancer, and that quitting smoking greatly reduces serious risk to health.

The evidence is going to be that Mr. Williams was a nice ma from a nice family, and cancer is a horrible disease. We all know that. We all have experiences with cancer and

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://industrydocuments.ucsf.edu/docs/kmhd0001

it is a horrible disease. And there is no question that Mr. Williams is missed a great deal by his family.

And I want to tell you something, it is only natural for all of us to feel sympathy for someone who has lost their husband, for someone who has lost their father, but as jurors, it's your duty to decide this case based on the evidence that is presented in this courtroom, not on sympathy, not on newspaper articles you may have read, not on sound bites from 60 Minutes or documentaries, not on opinions that you have heard other people express, but on the evidence that's presented in this courtroom, and applying the law that Judge Brown tells you to apply.

So with that introduction, let's turn to plaintiff's claim and let's preview what evidence will be. First, let me tell you, this is a legal document. It is the fourth amended complaint, and in it, the plaintiff tells us their legal theories, tells us basic facts about Mr. Williams, and tell us why they think Philip Morris should be responsible, and why they're entitled to recover.

Now, according to this complaint, Mr. Williams began smoking Marlboro cigarettes in 1955. Where was he in his life? He was 26 years old. He was a veteran, having served his country in Korea. He was married to Mrs. Williams. He was a father.

The evidence will be that the first time that Mr. Williams picked up a Marlboro cigarette, he was an adult making adult choices. Here are plaintiff's legal theories. This won't be exactly the way the Court instructs you, but this will be close enough to get the idea.

First theory, strict products liability. The plaintiff's claim that Marlboro cigarettes are defective and more dangerous than the ordinary consumer would expect. Second, negligence. The plaintiff's allege that Philip Morris acted unreasonably in manufacturing and selling Marlboro cigarettes.

And their third claim is what is known as their deceit claim. They'll argue that Philip Morris somehow deceived Mr. Williams about the dangers of smoking. With plaintiff's claims in mind, we can divide all of the evidence that Philip Morris will introduce in this case into

one of four categories.

The first, awareness or consumer expectations will address plaintiff's strict liability claim that cigarettes are more dangerous than the ordinary consumer would expect, and plaintiff's deceit claim, that Philip Morris somehow deceived Mr. Williams.

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://industrydocuments.ucsf.edu/docs/kmhd0001

Let's just briefly preview what the evidence will be. The evidence will be that the ordinary consumer has long known that cigarette smoking may cause lung cancer, and if you start smoking, you may have trouble quitting.

The evidence will demonstrate that at all times there was enough information to make a complete and accurate and voluntary and a reasonable decision whether to smoke.

The second category of evidence, reasonable conduct. This addresses plaintiff's negligence claim. Plaintiff's claim that Philip Morris acted unreasonably in manufacturing and selling cigarettes. We have all touched on this already. It came up in jury selection yesterday, and Mr. Gaylord mentioned it and I think even Mr. Thomas mentioned it, but to understand the judgments that Philip Morris has

made about smoking and health, you have to mentally transport yourself back in time to the '50s.

People have said that things were different, times were different, science was different, and although it was common knowledge for decades that there were risks associated with cigarette smoking, this is when science first began looking at the issue systematically.

Many of the instruments that we rely on today to measure and analyze things that smoke, they didn't exist then. Philip Morris and others had to work to invent technology and come up with techniques which would allow them to study the composition of smoke with very small, minute amounts of smoke. The evidence will be Philip Morris acted reasonably.

Now, at the same time, studies were coming out which linked cigarette smoking to cancer, and we'll talk about that. These early studies did not prove that smoking caused lung cancer, but they raised a lot of questions and sparked a lot of debate, both within the scientific community in general and within Philip Morris.

What did Philip Morris do about it? Along with others, they set up an independent research institute to study the problem and address the criticisms. The other thing they did was they changed their product.

You will hear how Philip Morris worked with the National Cancer Institute and the Federal Government, and other tobacco manufacturers to make what the Natural Cancer Institute describes as a less hazardous cigarette.

You'll hear how those tar and nicotine levels had dropped 70 percent from the 1950s, the tar and nicotine has come down 70 percent since the 1950s when those studies first came out. And finally what you'll hear is that

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

nothing was hidden from the public.

Philip Morris, the Government, the public health community had the same information and the same opportunity to express their opinions about what that evidence did and did not prove.

This takes us to our third category, cancer, what we know and what we don't. There are three basic facts, three basic facts about smoking and lung cancer. Fact number one,

statistically more smokers get lung cancer than nonsmokers. That's a fact. Fact number two, nonsmokers get lung cancer, too. There are things other than cigarette smoke that we are all exposed to every day that are suspected in causing lung cancer. That's fact number two.

Fact number three, and I expect this will surprise you, 90 percent of smokers don't get lung cancer. Nine out of every ten smokers don't get lung cancer. Now, those are the three basic facts, and what they tell us is there is an awful lot about cancer that we don't know and we don't understand.

And first of all, cancer is not a single disease. There are many types of cancer. There are many types of lung cancer. Some are associated with cigarette smoking and some aren't. The fact that someone gets lung cancer, that doesn't tell you what caused the cancer. Nonsmokers get lung cancer, too.

If you took the cancer cell from a nonsmoker and put it under a pathologist's microscope, and you took a cancer cell from a smoker and put it under that same microscope side by side and look at them, they look the

same. You can't tell what causes a cancer by looking at it.

Another important fact: A cancer can start in one part of the body and metastasize or spread to another part. The fact that a cancer is found in the lung doesn't mean it started in the lung. In a nutshell, that's what we know about cancer.

Our final category, the ability to quit smoking. Plaintiff will tell you that Mr. Williams didn't quit because he couldn't quit; that nicotine had somehow compromised his freewill to choose; that he was somehow different from everyone else.

There will be no evidence that he was different from everyone else. There will be no evidence that he was different from those 50 million Americans that quit. There will be no evidence that he was different from the eleven members of his family that quit. In fact, members of the jury, the evidence will be to the contrary.

The evidence will be that Mr. Williams was a well informed, decisive, strong willed person who made his choices about what he

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

enjoyed and how he wanted to live his life.

So that's the big picture. Let's now turn to details. I have a time line, we're all big on time lines today, that will help me walk you through some of the key factors. Let me start out by repeating some of the things Mr. Gaylord said, and that is tobacco and health, the issue of tobacco and health.

That's not a new issue. That's older than the country itself. In 1492, hundreds of years before Philip Morris came into existence, Columbus arrived in America. He wrote in his diaries that he saw the Native Americans smoking tobacco and had observed the difficulty they had in going with out it.

What's important about that? Hundreds of years before Philip Morris was even around people were smoking tobacco. Philip Morris didn't invent smoking. It is a custom that has a long history, but let's jump forward to the events in Mr. Williams' lifetime. Let's focus on what was going on when he growing up. Let's focus on how the evidence developed.

Let's start with just some basic biographical facts about Jesse Williams. You

can probably see that I have Williams' facts in red, and I have smoking and health facts in blue.

But as you heard, Mr. Williams was born in 1929 in Crockett, Texas. He lived, grew up and went to school there. June of 1948, he joined the Army, and it was some time in 1950, he was stationed in Korea and he began smoking.

Now, you heard reference to early tobacco ads. There will be no evidence that ads had anything to do when Mr. Williams began smoking. In fact, counsel conceded Mr. Williams began smoking because he was told that smoke would keep the mosquitoes off.

Sometime in the next year, Mr. Williams met Mrs. Williams, and I believe it was Christmas Eve of '52 that they were married, Mr. Williams was discharged from the service in June of 1953. Now, in her deposition, Ms. Williams testified that in the early years of their marriage, Mr. Williams smoked less than a pack a day.

Now, let's look how the evidence linking cigarette smoking to lung cancer was developing at the same time. The evidence that ties

cigarette smoking to lung cancer, basically there are two types.

You heard about epidemiological or statistical evidence, and then there is what is called physiological or laboratory evidence. The first epidemiological study about cigarette smoking and cancer was published in 1950, and

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

what these researchers did is they looked at people who had lung cancer and they found that more of them were smokers than nonsmokers.

What that told them was there is a statistical association between cigarette smoking and lung cancer. Now, point one, epidemiology was a brand-new science in the '50s. Back then and even now, most scientists agree that a statistical association between something and a disease doesn't prove that that something caused the disease, but despite these limitations, these studies got a lot of attention.

This takes us to 1953, and this is a key point. Two researchers in St. Louis, Missouri, Ernst Wynder and Evarts Graham, conducted the famous landmark Wynder/Graham study. And what these two prominent researchers did is they took

a strain of mouse that was known to be susceptible to developing skin cancer, a specific strain, and they shaved their backs and then they painted on a bunch of tobacco smoke condensate, or tar, and they found that half the mice developed skin tumors, half those mice developed skin tumors because of tobacco smoke condensate.

Now, a couple of caveats, the number of cigarettes or rather the amount of condensate necessary to produce those tumors was the equivalent of smoking 650 cigarettes a day. A lot of cigarettes, the researchers themselves admitted they didn't know whether this study applies to humans.

They said, "What it tells us is that enough tobacco smoke condensate will produce skin tumors on the backs of mice half the time. We don't know whether that means that fresh inhaled smoke will produce lung carcinomas in humans," but notwithstanding that, these studies got a bunch of publicity and were a really big deal.

This takes us to 1954. Mr. Gaylord showed you The Frank Statement. He showed you

some statements in The Frank Statement and suggested that Philip Morris made some promises it didn't keep.

Well, during this case, I will address that, but I want to show The Frank Statement for another purpose. I want you to focus on the first two paragraphs, and let's read it together. This is 1954. Let's me tell you first, let me give you the background of what The Frank Statement is.

This was published -- can you see it everyone? Those are the first two paragraphs. This was an ad that was published in every, major newspaper in this country, January 4th, 1954, including The Oregonian. It was paid for by a number of sponsors, including Philip

http://legacy.library.ucsf.edu/tid/kmd05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

Morris.

The purpose of the ad was to announce the formation of the Tobacco Industry Research Council. Does that make it better or worse? Better? All right. Let's read this together.

January 4th, 1954, Philip Morris paid to put this ad in The Oregonian and other newspapers, "Recent reports on experiments with mice," Wynder/Graham, "have given wide publicity

to a theory that cigarette smoking is in some way linked with lung cancer in human beings.

"Although conducted by doctors of professional standing, these experiments are not regarded in as conclusive in the field of cancer research. However, we do not believe that any serious medical research, even though its results are inclusive should be disregarded or lightly dismissed."

The evidence when be that the Philip Morris acted reasonably and responsibly. These early studies were not disregarded or lightly dismissed. They led Philip Morris to fund hundreds of millions of dollars in research with organizations like the American Medical Association, the American Cancer Society, the National Cancer Institute, and some of the best universities in this country.

Now, I mentioned this was published in The Oregonian on January 1st, 1954. Jesse Williams read The Oregonian. Let me tell you about a couple other things that happened in 1954. A Gallop poll revealed that 90 percent of the people polled in 1954 said they had recently read or heard that cigarette smoking could be a

cause of cancer in the lung.

In 1954, 90 percent said they had recently heard or read that cigarette smoking could be a cause of cancer in the lung. One other interesting fact about 1954, that was when the first plaintiff filed the first lawsuit claiming that a cigarette company was responsible for his lung cancer.

Now, again, in the fourth amended complaint plaintiff tells us that Mr. Williams began smoking in 1955, 26 years old, a veteran, an adult making adult choices, a husband and a father. He began smoking Marlboros two years after the Wynder/Graham, one year after The Frank Statement, one year after the Gallup poll.

As I said in the beginning, the evidence will show that from the time Mr. Williams picked up his first Marlboro cigarette, he was already on notice that cigarette smoking was linked to lung cancer.

This take us to 1964. In 1964, the original Surgeon General's Report was published. This was a landmark in American culture and smoking and health. In this report, the Surgeon General conceded that statistical methods, that

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

is epidemiology, statistical methods cannot establish proof of a causal relationship, and this is the Surgeon General's language, members of the jury, "the causal significance of an association is a matter of judgment."

Now, the Surgeon General went on to make two major judgments in that report. Judgment number one, that smoking is causally associated with development of lung cancer, and I'll get to this in a minute, tuck this in the back of your minds, this is a big one, in 1964, the Surgeon General, after surveying all the literature said, "I make the judgment cigarette smoking should be characterized as a habit and not an addiction."

It wasn't just Philip Morris, the Surgeon General in 1964 said, "Cigarette smoking is a habit, not an addiction." I hate to get out of sequence, but it wasn't until 24 years later, 1988, even though these reports are published every year, that the Surgeon General changed his definition and changed his mind and then said, "Okay. Let's call it an addiction," but I am getting ahead of myself.

Two years later, 1966, Congress tells the

companies, "You put the Surgeon General's warning on the package of every cigarette sold in this country." From this point on, there was never a single cigarette that Jesse Williams smoked that didn't come in a package with a warning on the side.

1969, Congress said, "We're changing that warning, we're making it stronger." 1971, the Federal Communications Commission gets in the act, tells the companies, "No more ads on TV or radio." 1972, the FTC jumps in, says, "Don't just put the warning on the packs. It goes in the ads as well.

1984, Congress says, "Change the words again. This is the one, lung cancer and quitting smoking now greatly reduces your risk. This takes us to 1988.

The statute of repose. Let me get some notes, I want to make sure I get this exactly right, this is important. Judge Brown will instruct you that in Oregon when someone sues claiming injury from the use of a product, and I previewed this, Oregon law limits how far back in time the claim can go. Basically, that's a decision that the Legislature of Oregon has

made.

Now, this is not -- and this is important -- this is not a special rule for tobacco. This applies to virtually every product across the board. And what that means is plaintiff is making no claim for Marlboro cigarettes sold between 1955 and 1988.

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

What plaintiff must prove is that it's the cigarettes sold after 1988 that caused Mr. Williams' cancer. Those are the ones that are defective, those are the ones that are unreasonably dangerous, those are the ones we were unreasonable in manufacturing and selling the product, those are the ones that Mr. Williams was deceived about.

There is no claim for any of these cigarettes. Now, there is no claim from '50 to; '55 for another reason, no one knows what brand Mr. Williams started with. He smoked from '50 to '55. There is no allegation that it is a Philip Morris product, so he didn't start with Philip Morris, but he smoked Philip Morris.

This takes us to October of 1996, Mr. Williams was diagnosed with lung cancer and as Mr. Thomas detailed, in March of 1997,

Mr. Williams died.

Now, let's focus in more detail about what the ordinary consumer's expectations have been about cigarettes over the years. Members of the jury, there is not a public health issue in history that has received more sustained attention than smoking and health. I challenge you to think of any.

People have discussed it, people have debated it, people have argued about it literally for decades. And this debate did not occur in a basement or a secret laboratory somewhere, our some exulted ivory tower. It occurred in Congress; on the front pages of newspapers; in people's homes, including the Williams' home; and it occurred at Philip Morris.

Mr. Thomas touched on this, but in the '50s when Mr. Williams began smoking, things were different. One-half of adults in this county smoked. 90 percent of them smoked unfiltered cigarettes. Our Government gave cigarettes to soldiers during times of war. They gave them to Mr. Williams during the Korean War.

Through the years, cigarettes have been smoked by presidents, generals, movie stars, athletes, public figures and regular people of all types. But just to show our national schizophrenia, at the same time cigarettes enjoyed this popularity, they were consistently criticized as being bad for you, causing bad health and being immoral.

Mr. Thomas talked a little bit about what people thought about cigarettes in the '20s and '30s, and let me kind of fill that picture out a little bit. By the turn of the century, cigarettes were commonly referred to as coffin nails, cancer sticks, little white slavers.

Thomas Edison and Henry Ford wouldn't let their employees smoke. Ford wouldn't even hire

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

a smoker. At the turn of the century, 16 states banned the sale of cigarettes. Here in Oregon November 4, 1930, a constitutional amendment was submitted to the voters of this state to outlaw all smoking.

It is true the grade schools and high schools that Mr. Williams attended were required by law to teach the dangers of smoking, and they did. Students at the school where Jesse

Williams attended, if they were caught smoking, they were chastised or spanked.

Jesse Williams' brother, Henry, testified in his deposition, he was taught in high school that smoking was harmful to health and could cause the lungs to become dark.

The most popular magazine in the country in the 1940s and 1950s was Reader's Digest. It regularly ran articles critical to smoking. One was them was called, "Cancer by the Carton," and Mr. Williams read Reader's Digest.

Effects of smoking was so well known that they become part of our humor and our culture. In 1947, the number one song in the country on the Hit Parade was, "Smoke, Smoke, Smoke That Cigarette." It referred to nicotine smokers as nicotine fiends. Perhaps that song is familiar to some of you. Mrs. Williams remembers it. She testified that her parents owned a copy of it.

Now in 1964, as I mentioned, the Surgeon General's Report was front page news, and Congress began debating, "Do we put a warning on the package?" Different people had different views. The executive vice-president of the

American Medical Association testified to the FTC, that a warning, quote, "Will not alert even the young cigarette smoker to any risk of which he is not already aware."

Then in 1968, Dr. Daniel Horne, who is one of the early researchers who did, from the American Cancer Society, did the epidemiological study, 1968, Dr. Horne probably summed it up best when he said, "You could stand on a rooftop and shout, 'Smoking is dangerous,' at the top of your lungs, and you would not be telling anyone anything they didn't already know."

In short, members of the jury, the evidence will be that the public and the ordinary consumer have long known the risk of cigarette smoking. Now, Jesse Williams lived, went to school and worked in the real world.

Everyone who knew him describes him as intelligent and well informed. He was a man who started and ran his own business. And from the time Mr. Williams was little, his mother told him and his brothers and sisters that smoking wasn't good for you and it would kill you. In fact, Mr. Williams' mother specifically told him his smoking with would kill him.

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

In 1951, when Mr. Williams came home on leave, he hid his smoking from his parents. Mr. Williams was an avid reader. He read Time magazine from the 1950s to the 1970s. He read Reader's Digest, I already mentioned the Reader's Digest articles, and he read The Oregonian from the 1950s until his death.

Let me just show you an sample of headlines published in The Oregonian in 1954 and 1955, when Mr. Williams was reading it and making a decision to smoke.

"Cancer peril seen in fags," of course, fags was slang term for cigarettes. That's February 22nd, 1954. "Scientists figure risk percentages. A Harvard University scientist, once a heavy smoker himself said Sunday, a two-pack-a-day smoker multiplies his chances of lung cancer 52 times," 1954.

June 22nd, 1954, cover of The Oregonian, "American Cancer Society links cigarettes, life span." Also in 1954, "Report of Cancer Society points to cigarette smoking." 1955. In 1955, The Oregonian, members of the jury, "Lung cancer risk said cut when cigarettes are given up."

You've already heard Mr. Thomas tell you

that Mrs. Williams used to urge her husband to quit smoking, telling him the cigarettes would kill him. His children told him the same thing.

Mr. Williams himself told his children not to smoke. He told them it was a bad habit and would rot their teeth. When he caught his son, Calvin, secretly smoking, he chased him on off the porch with a broom handle. When he caught his other two sons, he gave them a big lecture about it.

Mr. Williams himself used the words, "cancer sticks," in referring to his cigarettes. Other members of Mr. Williams' family used to try to get him to quit. His brother-in-law, Eddie, quit cold turkey in 1969, tried to encourage Mr. Williams to quit.

Both of Mr. Williams' sisters told him he should quit smoking. As I think Mr. Thomas told you, the family became particularly concerned in 1970 when Mr. Williams developed a strong cough, the family and his doctors attribute to cigarette smoking.

The Court will instruct you that under Oregon law a product is defective and unreasonably dangerous only, only, if it is more

dangerous than the ordinary consumer would expect. The evidence will be that Jesse Williams was an ordinary consumer.

The Court will also instruct you that plaintiff can recover under her deceit claim only if Mr. Williams was, in fact, deceived. That is he was misled or did not have enough

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

information or the right information to make an informed choice.

Now, the next thing I want to discuss is whether Philip Morris has acted reasonably. And I'm going to take the bait, because both Mr. Thomas and Mr. Gaylord said, "Sure, Jesse Williams made his choices, you make Mr. Cofer tell you about Philip Morris' choices," and I agree this case is about risk, it's about choices, and it's about responsibility for those choices.

And I am going to tell you, I am going to preview for you, the choices that Philip Morris has made and how its acted as a reasonable manufacturer. First, I want to digress for a moment and talk about some of the documents.

Mr. Gaylord showed you snippets of documents, Philip Morris documents, Tobacco

Institute documents, CTR documents that he selected, and he suggested that those documents taken out of context are representative of the actions of the hundreds of individuals who have worked at Philip Morris over the last 50 years.

Members of the jury, you are going to get a chance to decide that and I am going to tell you what I am going to do. I am going to bring to the witness stand the people at Philip Morris whose job it is to make cigarettes and test cigarettes and improve cigarettes and sell cigarettes, and they're going to raise their right hand and they're going to look you in the eye, and they're going to tell you what they have done and what Philip Morris has done.

And Mr. Thomas and Mr. Gaylord can ask them relevant questions until the cows come home, and I'll leave it to you to judge whether some snippets of documents taken out of context are a better indicator of who Philip Morris is and how it conducts itself or whether these people's sworn testimony is.

One last thing on the documents, I am not going to go through them one by one. We will when we get to the trial, we will address those

documents, but there are two documents that suggest this INBIFO thing was just a big secret.

True, INBIFO is a lab in Germany that Philip Morris owns to conduct high quality animal research, that's certified by every organization that can certify it, and it is recognized as one of the finest laboratory in the world that does that kind of work.

Now, with respect to those documents, INBIFO kept every document. They've kept their records fastidiously going all the way back to everything they did, and those documents have been produced in this country. Documents weren't destroyed, research wasn't hidden, that stuff is available.

Let me give one more common sense

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

observation. These bad documents that the plaintiffs are showing you, where do you think the bad documents come from? They came from Philip Morris. We produced the documents. We produced the bad documents that you're looking at. I am not sure that is real consistent with trying to hide information.

All right. I apologize, I got side tracked. Conduct, Philip Morris, what has

Philip Morris done? Well, they have done a lot of things. First, the evidence will be when you hear about it, they conducted research in their own labs and they gave money to outside researchers to study smoking and health.

What else did they do? Their scientists attended meetings, they cooperated with Government health officials. You'll hear about the tobacco research. That's a story we're proud of and that's a story we'll tell you.

Philip Morris invented technology that helped scientists understand. Philip Morris research and Philip Morris has published hundreds of articles in scientific literature that has contributed to an understanding of cigarette smoking and health.

Second, Philip Morris didn't just study how to make cigarettes better. I told you about their work with the National Cancer Institute. They helped produce a cigarette that the National Cancer Institute has described as less hazardous.

They brought their tar and nicotine level down 70 percent. Plaintiffs will call that controlling the product. You better they

control the product. They studied the smoke, they found ways to bring the tar and nicotine levels down, they found ways to make effective filtration, they found ways to use tobaccos and methods that were less biologically active.

That is not a code word for cancer. Biologically active don't mean cancer. Ask any scientist, we'll ask them when they take the stand, they don't mean the same thing, they're not a code word. They actually improved the product.

And I'll tell you something else you'll hear, and this is an interesting and exciting part of the story, right now Philip Morris is test marking a revolutionary new product, one that doesn't burn tobacco but heats tobacco. You'll learn how this product is the result of 25 years of cutting edge technologies that were literally unimaginable even five years ago.

You will hear about the collaboration, the way scientists that literally invented metals that the Department of Defense is interested in, all sorts of hard work generally focused on developing a safer product.

False controversy. Plaintiff has

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

suggested that Philip Morris misused science to create a false controversy. The fact is scientific investigation is going on right now, that's a fact. It involves areas of legitimate research, legitimate debate and legitimate disagreement.

The evidence will be that Philip Morris has made major contributions to understand smoking. Now, while everyone knows that if you smoke, you may have trouble quitting and you may get lung cancer, scientists don't understand why that is true or what to do about it.

Philip Morris admits that cigarette smoking may cause certain types of lung cancer, but no one knows what causes the healthy cell to turn bad. No one knows why 90 percent of smokers don't get lung cancer.

No one knows if smoking causes it all, why lung cancers are common -- well, not common, why there are lung cancers in nonsmokers, too. Nonsmokers get lung cancer, too. No one believes that smoking is the only cause of lung cancer. Aerosols, asbestos, rayon and chemicals are all suspected in causing lung cancer.

Members of the jury, what people disagree

about is not the evidence but what the evidence means, and there is nothing wrong, let me make this clear, there's a lot of discussion on this, there is nothing wrong with using statistics in making public health decisions, to promote education, to discourage people from smoking, to provide information to consumers so they can choose whether to smoke, but the fact that Philip Morris may disagree in part with some of the judgments that are made does not mean that it acted irresponsibly.

In deciding whether Philip Morris acted reasonably, I submit to you the question you have to answer is not who's right or who is wrong, but has Philip Morris conducted itself responsibly based on the available scientific information, the available scientific evidence at the time.

You can relax, I am getting close.

You heard about the Council for Tobacco Research. Plaintiff has also suggested that CTR is a fraud and sham and mere public relations device. First, I would suggest that would probably come as news to the researchers who receive hundreds of millions of dollars in

funding from CTR.

Let's look at the time line. The first epidemiological study comes out in 1950. Wynder/Graham, 1953; CTR formed, 1954. Pretty prompt. Second, let's look at the facts. CTR has given hundreds of millions of dollars to independent researchers who study smoking and

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

health. The money has gone to universities like Harvard, Stanford, UCLA, Cal Berkeley.

The money has gone to independent researchers, some of whom went on to win the Nobel Prize in their field. CTR has co-sponsored research with the likes of National Cancer Institute and the American Cancer Society.

More than 6,000 scientific articles have been published as a direct result of CTR funding, and this is the kicker, CTR research has been published and CTR research has been cited over 350 times by the Surgeon General in the Surgeon General's Report.

Now, does Philip Morris and the other sponsors anticipate a public relations benefit from forming and funding CTR. Absolutely. Of course they did. They were proud of it. They

were proud of what they were doing. They believed they were acting responsibly. They wanted to tell the public about it.

What should they have done, kept it secret? Kept this research a secret? What would the claim be if they did that? None of this detracts from the breadth of the research or the quality of the research, and we'll tell you about CTR.

A couple more points. Cancer. Can plaintiffs prove that the Marlboro cigarettes smoked after September 1st, 1988, caused Mr. Williams' cancer? That's the question. First, there is virtually no cancer that has only one known cause.

Some cancers are believed to be caused by exposure to the workplace or the environment or lifestyle decisions, like diet. Other cancers are believed to have no known cause, no cause from any outside exposure. They just happen. We know that genetics and heredity and family history all play a role in whether someone develops cancer.

Now, you say, "That's interesting, counsel. What does that have to do with

Mr. Williams?" Well, when he went to the doctor, he told the doctor he had been exposed to asbestos. We know he was a custodian, he worked with cleaning solutions and chemicals, and we know there are a number of people in Mr. Williams' family who had cancer, including nonsmokers like his daughter.

We know that often a cancer starts in one part of the body and is found in another part. We know that cancer was seen in Mr. Williams lung. Did it start there? Was it a type of cancer that is associated with cigarette smoking?

The experts will tell you that when it comes to cancer the best evidence is an autopsy. One wasn't conducted here. We don't have as

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

much evidence as we'd like, but that's an issue, is there enough evidence? Is there enough evidence to reach that conclusion?

Last point, the ability to quit smoking. The fact that there's nicotine in tobacco is no secret. Nicotine occurs naturally in the tobacco plant. The evidence will be that cigarettes are not spiked with tobacco -- I am sorry, cigarettes are not spiked with nicotine.

Nicotine is not added to tobacco.

The cigarette is not manipulated in any way to hook the smoker. In fact, the amount of nicotine present in the cigarette is always -- it's usually less than the amount of nicotine that is found naturally in the tobacco used to make the cigarettes.

Let me repeat that: The amount of nicotine that is in the cigarette the smoker actually has is always substantially less than the amount of tobacco that occurs -- or the amount of nicotine that occurs naturally in the tobacco used to make the cigarette. The process of making the cigarette reduces the amount of nicotine always.

In his opening statement, Mr. Gaylord referred to ammonia compounds. Well, here is the bottom line on ammonia compounds. The fact that there is ammonia compounds in tobacco is no secret. They occur naturally in tobacco. Ammonia compounds are used in any number of consumer products, milk, bread, beer, Twinkies.

Ammonia compounds impart the flavor, that's why they're used. And finally, the ammonia compounds have absolutely no effect on

the amount or form of nicotine that gets to the smoker. There will be no evidence that ammonia or any of that stuff has anything to do with Mr. Williams' decision to continue smoking.

So why do people smoke? You saw a document that address it, why do people smoke. There are lots of reasons. Taste, flavor, relaxation. Well, let me tell you, there is no doubt that one reason is nicotine. Just like people drink coffee for caffeine, eat candy for sugar, the fact that people smoke in part for nicotine, that is not a secret. It is common sense. People have always known that.

Was Mr. Williams addicted? Well, depending on how you define addiction, I suggest, members of the jury, the label doesn't matter. Whether he was addicted or not addicted, that doesn't mean that he could not quit or that he isn't responsible for his decision to quit.

Addiction is not a thing; it's a judgment. So what that means is whether you consider nicotine to be addicting depends on how you define addiction. I told you in 1964, the Surgeon General's definition was cigarette

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001

smoking should be characterized as a habit and not an addiction, even though other researchers were publicly urging that he call it addictive.

In 1988, using a different definition, the Surgeon General said, "Let's call cigarettes addictive. That's what they should be called now." But for the purpose of deciding whether Mr. Williams was responsible for his decision to smoke, the label isn't important, what is important is the effect of the product on Mr. Williams.

Did nicotine turn Mr. Williams into a helpless victim? Did it cause him to lose his ability to reason, to make judgments, to seek advice, to ask for help, to go to the doctor?

The evidence will be that anyone who really wants to quit smoking and makes up his or her mind that they can quit smoking does quit smoking. Now, don't misunderstand me, I am not saying it is always easy. Some people have to try, and try hard, and try again. But the evidence will be that anyone who really decides they're going to do it, gets it done.

As I told you when I first stood up here, this case is about Jesse Williams and whether

his family is entitled to recover money damages, because Mr. Williams choice to smoke.

As you listen to the evidence the plaintiff presents over the next two weeks, ask yourself, what does this have to do with Jesse Williams? How did this document or this ad or this testimony, how did it affect Mr. Williams? And ask yourself, who is responsible for Mr. Williams' decision to begin and his decision to continue smoking?

I want to thank you for your attention. It is going to be a few weeks before we have a chance to put on our witnesses and tell you our side of the story, and all I ask is that you keep an open mind and stay tuned, and we'll get back with you and we're going to tell you the rest of the story. Thank you very much.

THE COURT: Thank you, Mr. Cofer.

Jurors, thank you for your hard work today. Tomorrow we begin the evidence. I need you in the jury room across the hall at 9:30. I'll be working with the lawyers before then on some matters so that we hope to be ready to go at that time.

I understand those of you, those four of

you over there are wondering if you have special status. You are, indeed, our alternate jurors. The jury, under the Oregon Constitution, is comprised of 12 jurors. There is a significant investment by everyone, all of your jurors, in the conclusion of the trial, so look at yourself as insurance policies that we can get this case absolutely finished in the event that something

http://legacy.library.ucsf.edu/tid/km05a00/pdf Source: http://industrydocuments.ucsf.edu/docs/kmhd0001

happens that makes one of the 12 jurors unable to serve, but we want all of you, all of you to pay 100 percent attention and feel a part of the group, so that's the answer to that question.

Tomorrow morning that bench may not be there. We're going to try to rearrange that a bit. You like that. I know these folks share your feeling. These chairs are no picnic either over here, but we're going to try to get things arranged so that we get you more comfortable and get a few more pillows down here. If you want to bring a pillow from home or some support, feel free to do that.

Those of you who have cell phones, in some courtrooms and some jury rooms there are signs that say you can't use them. This is a long trial. I know you are going to need to

access the outside world on the breaks.

You may use your cell phones, but be sure to have them turned off when you come into court. And when you use them, use them in a way where you are not affecting everyone else's privacy to do that. Find a place to use them where you can use them reasonably.

I thank you for your attention, you're free to go tonight. Watch your step coming out of the box. Remember not to discuss the case, and we'll see tomorrow at 9:30. Travel safely and stay dry. Good evening.

(Whereupon, the following proceedings were held in open court, out of the presence of the jury:)

THE COURT: A couple of reminders to plaintiff's counsel, I know it will be difficult, but when you refer to the decedent it must be by first and last name. I know that it has probably gotten comfortable, but it simply has to be that counsel refer to him by first and last name, or as Mr. Williams.

Of course, Mrs. Williams may refer to her husband in any way she chooses, in any way that

is comfortable, but the lawyers need to keep the Court's rule observed.

And Mrs. Williams, and for the members of your family, if at any point during the trial things become difficult for you, you just feel free to do whatever works for you. If you need to leave, that's absolutely okay. If you need a break, you let us know. We want to be sure that we can get the trial concluded and if you feel you need time to compose yourself or something is really disturbing you, just let your lawyers know and we'll take a break and see if we can accommodate that.

MRS. WILLIAMS: Thank you.

THE COURT: Anything for the record from the plaintiffs?

MR. GAYLORD: No, Your Honor.

THE COURT: Defense?

For you, 8:45. I want to take up first

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://industrydocuments.ucsf.edu/docs/kmhd0001

with the defendant's motion regarding Dr. Benowitz's testimony.

We're off the record.

(Court adjourned, 2-24-99, Afternoon Session, at 5:00 p.m.)

REPORTER'S CERTIFICATE

I, Katie Bradford, Official Reporter of the Circuit Court of the State of Oregon, Fourth Judicial District, certify that I reported in stenotype the oral proceedings had upon the hearing of the above-entitled cause before the HONORABLE ANNA J. BROWN, Circuit Judge, on February 24, 1999;

That I have subsequently caused my stenotype notes, so taken, to be reduced to computer-aided transcription under my direction; and that the foregoing transcript, Pages 1 through 77, both inclusive, constitutes a full, true and accurate record of said proceedings, so reported by me in stenotype as aforesaid.

Witness my hand and CSR Seal at Portland, Oregon, this 24th day of February, 1999.

_____

Katie Bradford, CSR 90-0148
Official Court Reporter

I certify this original/duplicate original is valid only if it bears my red colored CSR Seal. Katie Bradford

GENERAL INDEX

	Page No.
Plaintiff's Opening Statement (Continuing)	3
Defendant's Opening Statement	30

* * * *

http://legacy.library.ucsf.edu/tid/kmh05a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kmhd0001